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IN THE
COURT OF APPEALS OF INDIANA

LESTER ROWE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0702-CR-129
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0410-FB-193688
Cause No. 49G02-0410-FC-193996
Cause No. 49G02-0410-FB-195403

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Lester Rowe ("Rowe") belatedly appeals his 2005 sentence of twenty years after pleading guilty to two counts of Robbery, one as a Class B felony and the other as a Class C,[1] Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony,[2] Attempted Robbery, a Class C felony,[3] and a Habitual Offender allegation.[4] We affirm.

Issue

Rowe raises the issue of whether his sentence is inappropriate.

Facts and Procedural History

On September 14, 2004, Rowe entered an O'Charley's restaurant, armed with a nine-millimeter handgun, and demanded money from the establishment's safe. The employees yielded to Rowe's demand, giving him over a thousand dollars. On October 16, 2004, Rowe entered a PayLess Shoe Store with a gun and demanded the money in the cash register. Although Rowe had a gun, no one in the store saw it. Again, Rowe was given money, which amounted to approximately one hundred dollars. Finally, on October 17, 2004, Rowe walked into a Popeye's Chicken restaurant and asked the cashier whether their chicken fingers were fresh. After receiving an affirmative answer, Rowe demanded the money in the cash register, telling the cashier that he had a gun and "didn't want it to be a murder." Trial Transcript at

[1] Ind. Code § 35-42-5-1.

[2] Ind. Code § 35-47-4-5.

[3] Ind. Code §§ 35-41-5-1 and 35-42-5-1.

24. Due to someone either recognizing Rowe or realizing that he was under the influence of drugs, some customers were able to make Rowe leave the store without incident. All of these crimes occurred in Marion County.

The State filed charges against Rowe for each incident under separate cause numbers. Based on the September 14th incident, Rowe was charged with Robbery as a Class B felony, Criminal Confinement, as a Class B felony,[5] Carrying a Handgun Without a License, as a Class A misdemeanor,[6] Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony and alleged to be a Habitual Offender. For the October 16th incident, Rowe was charged with Robbery, as a Class C felony, Theft, as a Class D felony[7] and alleged to be a Habitual Offender. In the third cause, Rowe was charged with Attempted Robbery, a Class B felony, and alleged to be a Habitual Offender. The three causes were later consolidated.

Rowe and the State entered into a plea agreement where Rowe agreed to plead guilty to two counts of Robbery, one as a Class B felony and the other as a Class C, Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony, Attempted Robbery, a Class C felony, and one of the Habitual Offender allegations. In exchange, the State agreed to dismiss the four other charges and two additional Habitual Offender allegations. Pursuant to the plea agreement, the State would also recommend an executed sentence of between sixteen and thirty years.

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[4] Ind. Code § 35-50-2-8.

[5] Ind. Code § 35-42-3-3(b)(2)(A).

[6] Ind. Code § 35-47-2-1.

[7] Ind. Code § 35-43-4-2.

The trial court accepted the plea agreement. In fashioning the sentence to be imposed, the trial court noted:

> The risk that the Defendant will commit another crime: Court believes that if the Defendant continues to use and abuse substances that that risk will be great. And the Court has also looked at the Defendant's prior character, conduct and criminal history, as stated before, when he's in Court, he's very respectful, when he's sober my guess is he's a different kind of man when he's out on the street and he's under the influence, so anyway, the Court has considered all that. The Court's considered the Defendant's prior criminal history which is likewise extensive, however, in that regard he's pleading guilty to several counts, which he's already taken that into account, that being a habitual offender and the serious violent felon.

Tr. at 38-39. The trial court then sentenced Rowe to ten years for Robbery, as a Class B felony, ten years for Possession of a Firearm, four years for Robbery, as a Class C felony, and four years for Attempted Robbery. Based on Rowe pleading guilty to the Habitual Offender allegation, the trial court enhanced the Class B Robbery conviction by ten years. The sentences were ordered to be served concurrently, resulting in an executed sentence of twenty years.

On January 4, 2007, Rowe, *pro se*, filed a Motion for Permission to File a Belated Notice of Appeal and For Appointment of Counsel, which was subsequently granted. This appeal ensued.

Discussion and Decision

At the outset, we note that Rowe committed these crimes and was sentenced prior to the legislature enacting the advisory sentencing scheme, and therefore was sentenced under the presumptive or fixed sentencing scheme. On appeal Rowe contends that his sentence is inappropriate. Specifically, he argues that this Court should reduce his sentence because he

expressed remorse, was under the influence of drugs and alcohol when he committed the offenses, did not hurt anyone physically, and pled guilty.

Although Rowe pled guilty to the four charges and one allegation according to a plea agreement, he can still challenge the appropriateness of his sentence because the plea agreement was "open," leaving his sentence to the discretion of the trial court. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Pursuant to Indiana Appellate Rule 7(B), he seeks revision of his sentence.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under such review, a defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review. Childress, 848 N.E.2d at 1080.

The "nature of the offense" portion of the 7(B) standard speaks to the statutory presumptive sentence for the class of crimes to which the offense belongs. See Williams v. State, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), trans. denied. In other words, the presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crimes committed. Id.

Regarding the nature of the offense, Rowe was convicted of two Class B felonies, two Class C felonies, and found to be a Habitual Offender. These crimes were committed within a relatively short period of a little over a month and resulted in multiple victims. Rowe used the threat of violence with a gun to force the employees of the businesses to yield to his

demands for money.

The presumptive sentence for a Class B felony is ten years, with a maximum sentence of twenty years and a minimum sentence of six years. See Ind. Code § 35-50-2-5 (West 2004). The presumptive sentence for a Class C felony is four years, with a maximum sentence of eight years and a minimum sentence of two years. See Ind. Code § 35-50-2-6 (West 2004). In light of the accepted plea agreement, the trial court had discretion to impose an executed sentence ranging between sixteen and thirty years. Here, the trial court imposed the presumptive sentence for each conviction, ordered the sentences be served concurrently and added the minimum possible enhancement due to the Habitual Offender finding. See Ind. Code § 35-50-2-8(h) (West 2004).[8] The executed sentence amounts to twenty years.

The "character of the offender" portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Id. On appeal, Rowe asks this Court to reduce his sentence, citing as mitigating circumstances his expressed remorse and inability to control his actions due to the influence of drugs and alcohol when he committed the offenses. He also notes that he did not injure anyone physically and pled guilty.

Remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility. Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006). Without evidence of some impermissible consideration by the trial court, we will

accept its determination as to remorse. Johnson v. State, 855 N.E.2d 1014, 1016-1017 (Ind. Ct. App. 2006), trans. denied. Rowe does not allege any impermissible consideration, so we conclude that Rowe's expression of remorse does not necessitate a revision of his sentence.

We are also not persuaded by Rowe's point that his crimes were non-violent. The lack of violence during the commission of a robbery results in the defendant being charged with robbery as a Class B or C felony rather than a Class A felony. Rowe provides no explanation as to why in these particular circumstances the lack of violence for his Class B and Class C robbery convictions warrant a lesser sentence.

As for Rowe's decision to plead guilty, we are not convinced that his choice warrants a lesser sentence because he received a significant benefit in the State dismissing the three other felony charges, one misdemeanor charge and two additional Habitual Offender allegations.

Finally, Rowe has an extensive criminal history including five felonies, most of which involve stealing property. This repeating pattern of behavior could warrant a sentence above the presumptive, but the trial court chose otherwise.

Based on this evidence, we are not persuaded that Rowe's sentence is inappropriate.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.

[8] "The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years."